Thanks to My Adviser, May He Rot in Hell -- Free speech has its limits, the 9th Circuit rules, and one of them is the acknowledgments in a master's thesis.

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SAN FRANCISCO - Free speech does not give a graduate student the right to a passing grade on a master's thesis that is academically acceptable but includes caustic "disacknowledgments" critical of the graduate school and its dean, a splintered federal appeals panel ruled Monday.

The 2-1 vote by the 9th U.S. Circuit Court of Appeals included three separate opinions, and none of the three judges appeared to agree on the legal standard to apply in the academic free speech question raised by the dispute. *Brown v. Li*, 2002 DJDA 9195.

The decision leaves an open question in the 9th Circuit whether a 1988 Supreme Court decision limiting free speech rights for high school students should also extend to college and university students, a question also left unanswered by the high court in *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260.

The plaintiff, Christopher T. Brown, a master's candidate in the Department of Material Sciences at the University of California, Santa Barbara, received a passing grade and approval of his thesis, "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape," in 1999.

After the approval, Brown added an acknowledgments page that had not been seen by his thesis

committee. It was entitled "Disacknowledgments" and stated, "I would like to offer special f--- you's to the following degenerates for of [sic] being an ever-present hindrance during my graduate career ..." He then listed the dean and staff members of the graduate school, the university regents, library managers and even former Gov. Pete Wilson.

His committee and the school refused to grant his degree and the library refused to admit the thesis, a requirement for receiving a degree, until he changed the offending section.

Brown pointed to other master's theses that included acknowledgments to pets, family and friends, negative statements about inferior chemistry facilities, and even poetry, arguing there was no adherence by the school to any standard.

The university maintained that master's theses must adhere to academic publication standards to teach students how to present research results.

Brown spent more than a year battling the university over his right to publish the acknowledgments, and he was placed on academic probation. Brown finally was granted his degree May 15, 2000, one day after ABC's "Nightly News with Peter Jennings" contacted the school and expressed interest in a story about his struggles with the administration, according to the court. However, the paper was never admitted into the school library's collection.

Brown sued for damages, claiming he was unable to get work for a year because of the delay. The case was dismissed by a district judge. The appeals court Monday upheld that ruling but remanded the case, telling the district judge to explain the basis for dismissing Brown's separate claims based on the California Constitution.

Judge Susan Graber wrote that the only analogous case was the U.S. Supreme Court's decision in *Hazelwood,* holding that high school officials do not violate free speech rights when they prohibit publication in a high school newspaper of stories officials find objectionable.

Graber said she would extend the high court's rationale to college and university students as well, even though the Supreme Court expressly declined to rule on whether *Hazelwood* extended that far. Two circuits since *Hazelwood* have explicitly declined to apply the case to the university setting: the Cincinnati-based 6th Circuit in *Kincaid v. Gibson,* 236 F.3d 342 (2001) and Boston's 1st Circuit in *Student Govt. Ass'n v. Board of Trustees of the Univ. of Mass,* 868 F.2d 473 (1989).

But Graber reasoned those cases applied to extracurricular student speech in college yearbooks and newspapers that are entitled to broader First Amendment protection. She argued that Brown's thesis and rules governing its form were part of the school curriculum and subject to more stringent control by the school.

"We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry into whether a university's requirements for and evaluation of a student's curricular speech infringe that student's First Amendment rights," Graber wrote. "Nevertheless, of all the Supreme Court cases, *Hazelwood* appears to be the most analogous to the present case."

Judge Warren Ferguson, who joined Graber in a separate opinion, said he agreed that Brown's First Amendment rights were not violated but said the case should be dismissed for another reason.

He defined the case as an "erosion of academic integrity" and accused Brown of simply deceiving the thesis committee by not showing them the acknowledgments and trying to shield his conduct behind free speech.

Judge Stephen Reinhardt vehemently dissented on the free speech issue.

"Regulation of the speech rights of high school youths [does] not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish," Reinhardt wrote.

He argued that extending the *Hazelwood* standard to college and graduate school "would dilute the free speech rights of all students attending public institutions of higher learning."

The *Hazelwood* section of the majority opinion "is [Garber's] alone and is not joined by any other judge on this panel. Thus, her desire to import the *Hazelwood* standard into the university context does not constitute binding precedent," he wrote.

Reinhardt suggested alternative standards for a future panel, including designating the thesis a "public forum" in which the government may impose only reasonable time, place and manner restrictions, not viewpoint-based restrictions. He also suggested intermediate-level scrutiny in which the university would have the burden of showing that its regulation was related to an important pedagogical purpose.

Brown's attorney Paul L. Hoffman, of Schonbrun Desimone Seplow Harris & Hoffman in Venice, said he was particularly disappointed with the way Graber and Ferguson dealt with the record in the case.

He promised to seek en banc reconsideration by the court. "There is a significant issue about protection of

graduate students' free speech rights," he said.

"It is our view that the university does not have the right to engage in viewpoint discrimination," Hoffman said.

Hoffman said Brown is traveling in Europe and is unaware of the decision. He is working in the computer field, not material sciences.

Christopher M. Patti, an attorney in the university general counsel's office, said he disagreed with Reinhardt's characterization of the two majority opinions. "Graber appears to be writing for a majority, and Ferguson is offering an additional rationale," he said.

It appears the majority would extend *Hazelwood* to university students, he said, and he called the standards proposed by Reinhardt "unworkable with respect to academic papers."

Patti also disputed the court's assertion that Brown got the degree only after ABC expressed interest in the dispute. He said there was a deadline that Brown either get his degree or be dismissed. "The university decided to save him from himself and give him the degree rather than dismiss him."

It is safe to say, Hoffman said, that the university got far wider publicity about Brown's criticism than if they had just quietly parked his thesis on the library's shelves. "It is hard to believe people reading that title would be clamoring for copies," he said.